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No. 3032

United States Circuit Court of Appeals

For the Ninth Circuit.

SWAYNE & HOYT, INCORPORATED,
Plaintiff in Error,

vs.

LEONARD EVERETT,
Defendant in Error.

Transcript of Record.

Upon Writ of Error to the United States Court for China.

Filmer Bros. Co. Print, 330 Jackson St., S. F., Cal.

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INDEX TO THE PRINTED TRANSCRIPT OF RECORD.

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

United States of America,
Extraterritorial Jurisdiction in China,
At Shanghai, China,—ss.

Record of proceedings of the United States Court for China in the cause and matter hereinafter stated, the same being disposed of during a regular term of said Court held at the City of Shanghai, China, to wit, on the twenty-eighth day of December, 1916. Present, the Honorable CHARLES S. LOBINGIER, Judge of the United States Court for China.

Cause No. 507.
Civil Action No. 174.

AT LAW.

LEONARD EVERETT,

Plaintiff,

vs.

SWAYNE & HOYT, INCORPORATED,

Defendant.

Statement of Clerk.

Said action was commenced on May 17, 1916, and proceeded to final disposition on the day above written, and during the progress thereof pleadings and papers were filed, process was issued and returned and orders of the Court were made and entered in the order and on the dates hereinafter stated, to wit:

[1*]

*Page-number appearing at foot of page of original certified Transcript of Record.

In the United States Court for China.

Cause No. 507.

Civil No. 174.

LEONARD EVERETT,

Plaintiff,

vs.

SWAYNE & HOYT, INCORPORATED, a Corporation,

Defendant.

Filed at Shanghai May 17, 1916.

(Signed) EARL B. ROSE,
Clerk.

Petition.

The petition of the above-named plaintiff respectfully represents to this Honorable Court:

1st.

That the plaintiff is an American citizen, a resident of Shanghai, China, and is engaged in the business of shipping at said Shanghai.

2d.

That the defendant is a corporation duly incorporated under the laws of the State of California, United States of America, with its principal office and place of business at San Francisco, in said State.

3d.

That the steamship "Yucatan" is an ocean-going steam freighter owned by the north Pacific Steamship Company, an American corporation, and that said vessel is registered under the laws of the United

States of America at the port of San Francisco, California.

4th.

That the said S. S. "Yucatan" arrived at the port of Shanghai, China, on the 13th day of May, 1916, under charter from said owners to the said defendants for a voyage from the port of San Francisco, California, to ports and places in China and Japan and return to San Francisco, and for other Pacific Coast ports of the United States of America. [2]

5th.

That Jardine, Matheson & Company, Limited, a British corporation, were and are agents for said defendants at said Shanghai.

6th.

That prior to the arrival of said vessel at said Shanghai, to wit, on or about the 18th day of April, 1916, and from day to day thereafter until on or about the 5th day of May, 1916, the said defendants, through their said agents, advertised in the public press of said Shanghai that said vessel would be put on the berth at said Shanghai, and that applications for freight for a voyage to the port of San Francisco might be made to the said agents.

7th.

That on the 3d day of May, 1916, the plaintiff applied to defendants, through their said agents, for space on said vessel for from 200 to 300 tons (measurement) of freight from said Shanghai to any port on the Pacific Coast of America that said vessel might be destined for; that plaintiff, as a shipping contractor, actually had on hand at the time said offer was

made and now has on hand under contract for shipment for others to Pacific Coast ports of the United States of America over 400 tons (measurement) of cargo, consisting principally of hides and skins, and was desirous of shipping the said cargo to any Pacific Coast port of the United States of America, and was ready and willing to pay the defendants reasonable and ordinary charges for the freight so offered.

8th.

That at the time said offer was made the said defendants through their said agents were accepting offers for and allotting space to the public generally, and had at the time said offer was made by plaintiff sufficient space available in said vessel to meet the requirements of said offer. [3]

9th.

That the said defendants in placing the said steamer on the berth in Shanghai as aforesaid and in advertising for applications for space for freight for a voyage of said vessel from Shanghai to San Francisco, and in accepting the same from the public generally, were common carriers of freight for hire and as much were bound to accept plaintiff's said offer.

10th.

That the said defendants, through their said agents, on the 3d day of May, 1916, and again on May 5th, 1916, refused the plaintiff's said application for space and offer to ship as aforesaid by the said vessel on said voyage, upon the ground that they did not have space available on said vessel, but that thereafter, to wit, on the 8th day of May, 1916, after

plaintiff had called to the attention of said agents that they had allotted space to others applying at a date subsequent to the time of plaintiff's said application, the said agents of the defendants offered the plaintiff space on said vessel for said voyage provided the freight offered by the plaintiff should be passed by the British Consul at Shanghai and provided plaintiff did not offer more freight (or cargo) than the space at the disposal of said agents for the defendants.

11th.

That plaintiff declined to agree to the aforesaid conditional acceptance of said offer by said defendants through their said agents, in so far as it related to the submission of the freight offered by plaintiff to the approval of the British Consul at said Shanghai, and demanded that the defendants through their said agents accept said freight without said last-mentioned condition. That defendants through their said agents refused to comply with said demand. [4]

12th.

That plaintiff has been damaged by the acts and conduct of said defendants to the amount of the difference between the price at which plaintiff had contracts with others for the shipment of said freight and the price at which the said defendants were accepting freight of a similar character from the public at Shanghai, China, and that said difference is the sum of Four Thousand Five Hundred ($4,500) Dollars, United States gold coin.

WHEREFORE plaintiff prays for judgment against said defendant for said sum of Four Thousand Five Hundred ($4,500) Dollars, United States gold coin, for costs, and for such other further or different relief as to the Court may seem meet.

Dated Shanghai, May 17th, 1916.

L. EVERETT,
Plaintiff.

FLEMING & DAVIES,
Attorneys for Plaintiff.

United States Court for China,
Extraterritorial Jurisdiction in China,—ss.

Leonard Everett, being first duly sworn, deposes and says: That he has read the above and foregoing petition by him subscribed and knows the contents thereof, and that the same is true to the best of his knowledge, information and belief.

EARL B. ROSE,
Clerk, United States Court for China.

May 17, 1916. [5]

United States Court for China.

Cause No. 507.

Civil No. 174.

LEONARD EVERETT,
Plaintiff,

vs.

SWAYNE & HOYT, INCORPORATED, a Corporation,
Defendant.

Filed at Shanghai, June 15, 1916.

(Signed) EARL B. ROSE.

Demurrer.

The defendant above named, appearing by Jernigan and Fessenden, its attorneys, demurs to the petition herein on the ground that it appears upon the face of the petition that the Court has not jurisdiction of the person of the defendant, in that it appears from said petition that defendant is a corporation organized and existing under the laws of the State of California, United States of America, and having its principal office and place of business at San Francisco, in said State of California, and it does not appear from said petition that said defendant has any office, branch, place of business or property in China, or any official, agent or representative residing or being in China, over whom this Court has jurisdiction.

Dated Shanghai, June 15th, 1916.

(Sgd.) JERNIGAN & FESSENDEN,
Counsel for Defendant. [6]

In the United States Court for China.
Cause No. 507.

LEONARD EVERETT,

Plaintiff,

vs.

SWAYNE & HOYT, INCORPORATED, a Corporation,

Defendant.

Filed July 17, 1916.

(Sgd.) EARL B. ROSE,
Clerk.

Order Overruling Demurrer.

LOBINGIER, J.;

The defendant demurs to a petition alleging that it is a corporation organized under the laws of California with its principal place of business at San Francisco; that Jardine, Matheson & Co., Ltd., a British corporation, were and are its agents at Shanghai; and that in May, last, the defendant, thru said agents, wrongfully refused to permit plaintiff to send freight on one of its vessels unless such freight "should be passed by the British Consul at Shanghai."

The demurrer is based

> "on the ground that it appears upon the face of the petition that the Court has not jurisdiction of the person of the defendant in that it appears from said petition that defendant is a corporation organized and existing under the laws of the State of California, United States of America, and having its principal offices and place of business at San Francisco, in said State of California, and it does not appear from said petition that said defendant has any office, branch, place of business or property in China, or any official, agent or representative residing or being in China, over whom this Court has jurisdiction."

On first reading the above it appeared that the defendant sought to raise a question of service; but de-

fendant's counsel states that "the objection to the jurisdiction is not based upon the ground of deficient or irregular service of process." [7]

Moreover, according to most of the authorities,[1] at least, the demurrer itself would constitute a general appearance waiving any question of service.

Counsel for defendant, however, states the real point sought to be reached by the demurrer as follows:

> "A contract of agency was made between Swayne and Hoyt of San Francisco and Jardine, Matheson of Shanghai whereby the latter acted as agents for the former in loading and despatching the steamship "Yucatan." The contract was made at, and to be performed at, Shanghai. It was therefore a contract made by an American company domiciled in California with a British Company who, to all intents and purposes of this action, are located in British territory and who performed the contract in what in so far as they are concerned is British territory. Both the place of making and the place of performance of the contract are for the purposes of this action British territory. It is therefore submitted that the rights of the parties growing out of this agency contract should be construed and governed by English law. For many years an exception to the general rules of law governing the relations of principal and agent has always been recognized in English law

[1] Encyc. Pl. & Pr., II, 635.

in the case of an agent acting for a foreign principal.

It has long been established in England that an agent cannot pledge his foreign constituent's credit in the absence of express authority to that effect."

The authority [2] cited in support of this contention does not seem to us to go to the extent claimed even where the action is founded upon a contract; for the case merely holds that a vendor who gives credit to an agent believing him to be the principal, and to whom the real principal has paid, cannot, after discovering the latter, hold him liable. It appears to be very far removed from anything here and while some language used in the opinion might have a bearing on the present situation it could hardly be accepted as controlling.

For the question here is not the interpretation or enforcement of a contract but the determination of an American corporation's liability for an alleged tort and we have been cited to no authority, American or English, to the effect that even tho, as between the parties, a contract of agency might be construed according to foreign law, the tortious liability of the principal to third parties would likewise need to be so construed. If defendant were doing business here thru American agents there could be no question of its liability for torts committed by them within the scope of their agency. Can it be that they may evade such liability merely by select-

[2] Armstrong v. Stokes, L. R. 7 Q. B. 598; 41 L. Q. B. 253; 2 English Ruling Cases, 471. [8]

ing British agents? Under the act of Congress "the laws of the United States" are "extended over all citizens of the United States" in China "and *over all others* to the extent that the terms of the treaties respectively justify or require."[3] Would it be consistent with this language to hold that a citizen (natural or ~~judicial~~ juridical) of the United States could place himself under different laws by employing a foreign agent?

The case[4] cited by plaintiff's counsel seems much more analogous to that at bar than the one cited by defendant, the sole difference being that this action is brought in an extraterritorial jurisdiction. In view of the statutory language just quoted we are unable to see that this fact should require the application of a different doctrine.

Nor can we accept and apply to this court the doctrine advanced on the unsupported opinion of a text writer[5] with reference to the British consular courts that all parties to litigation before them must be habitually within their territorial jurisdiction. Regardless of whether such a doctrine is authorized under British legislation (and no authorities are cited) we find no American legislation which justifies it. On the contrary the courts of which this is the successor were expressly

> "invested with all the judicial authority necessary to execute the provisions of such treaties,

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[3] U. S. Revised Statutes, sec. 4086.

[4] Barrow Steamship Co. v. Kane, 170 U. S. 100, 42 Law Ed. 964.

[5] Piggot, Extraterritoriality, 199, 200. [9]

respectively, in regard to civil rights, whether of property, or person; and they shall entertain jurisdiction in matters of contract, at the port where, or nearest to which, the contract was made, or at the port at which, or nearest to which, it was to be executed, and in all other matters, at the port where, or nearest to which, the cause of controversy arose, or at the port where, or nearest to which, the damage complained of was sustained, provided such port be one of the ports at which the United States are represented by consuls. Such jurisdiction shall embrace *all controversies* betwen citizens of the United States, or others, provided for by such treaties, respectively."[6]

We see nothing in this, or in any legislation of Congress, which limits the jurisdiction of the Court to parties resident in China. On the contrary the American courts here are expressly given jurisdiction of "all controversies between citizens of the United States" without ~~restitution~~ reservation as to residence. Nor does the attempt to apply a doctrine, which confessedly is no part of the jurisprudence of the United States, merely because an American corporation has selected agents of another nationality, seem to us consistent with the provisions just quoted.

The demurrer is accordingly overruled.

By the Court,

CHARLES S. LOBINGIER,
Judge.

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[6] U. S. Revised Statutes, sec. 4085. [10]

In the United States Court for China.

Cause No. 507.

Civil No. 174.

LEONARD EVERETT,

Plaintiff,

vs.

SWAYNE & HOYT, INCORPORATED, a Corporation,

Defendant.

Filed at Shanghai, July 20, 1916.

(Sgd.) EARL B. ROSE,
Clerk.

Answer.

Defendant in answer to the petition of plaintiff herein respectfully shows to the Court and alleges as follows:

1. Defendant admits the allegations set forth in paragraphs one to five, inclusive, of said petition.

2. In answer to paragraph six of said petition, defendant alleges that the advertisement in the public press as in said paragraph set forth was made in the name of Jardine Matheson & Co.

3. In answer to paragraph seven of said petition, defendant admits that plaintiff applied to Jardine Matheson & Co. for space on said vessel as in said paragraph alleged but defendant has no knowledge or information sufficient to form a belief as to the truth of the other allegations in said paragraph seven set forth and therefore denies same.

4. Defendant admits the allegations set forth in paragraph eight of said petition.

5. In answer to paragraph nine of said petition, defendant admits that it was acting as a common carrier, but denies that it was bound to accept plaintiff's offer for reasons hereinafter set forth.

6. In answer to paragraph ten of said petition, defendant admits that its agents Jardine Matheson & Co. refused plaintiff's application for space on said vessel, and subsequently offered to accept plaintiff's freight upon conditions which were refused by plaintiff as in said paragraph ten set forth. [11]

7. Defendant admits that its agents Jardine Matheson & Co. refused to comply with plaintiff's demands as in paragraph eleven of said petition alleged.

8. Defendant denies each and every allegation set forth in paragraph twelve of said petition.

9. Defendant further alleges that at the times mentioned in plaintiff's petition a state of war existed between Great Britain and Germany.

10. That defendant's agents Jardine Matheson & Co. are British subjects and as such were prohibited and prevented by British law and Orders in Council, rules, regulations and decrees of the British Government from dealing in any way directly or indirectly with German subjects, or their agents, or German enemy goods.

11. That plaintiff at the times mentioned in said petition was acting as an agent for German subjects and the cargo offered to Jardine Matheson & Co., defendant's agents, by said plaintiff for shipment by

the said steamship "Yucatan" was cargo owned by and belonging to German enemy subjects of Great Britain.

12. That defendant's agents Jardine Matheson & Co. were prohibited and prevented by the authorities of the British Government from accepting and shipping the cargo offered by plaintiff.

13. That neither defendant nor its agents Jardine Matheson & Co. have committed any tort or breach of legal duty or obligation to plaintiff.

WHEREFORE, defendant prays that the petition herein be dismissed with costs and for such other and further relief as to the Court may seem meet.

(Signed) JERNIGAN and FESSENDEN,
Counsel for Defendant. **[12]**

Shanghai, China.

On this 20th day of July, 1916, before me personally came Vivian Hugo Lanning, who being by me duly sworn did depose and say that he is clerk of the said Shipping Department of Jardine Matheson & Co., that he has read the foregoing answer and knows the contents thereof and that the matters therein alleged are true to the best of his knowledge, information and belief.

(Signed) VIVIAN HUGO LANNING.

Subscribed and sworn to before me this 20th day of July, 1916.

(Signed) EARL B. ROSE,
Clerk United States Court for China. **[13]**

In the United States Court for China.

Cause No. 507.

Civil No. 174.

LEONARD EVERETT,

Plaintiff,

vs.

SWAYNE and HOYT, INCORPORATED,

Defendants.

Filed at Shanghai, Nov. 23, 1916, by leave of Court.

PAUL McRAE,

Acting Clerk.

Replication.

Now comes the plaintiff herein and in reply to the answer of the defendant herein,

1st.

Admits the allegations contained in paragraphs 9 and 10 of said answer.

2d.

In reply to paragraph 11 of said answer, plaintiff admits that as a part of his business as shipping agent he has accepted cargo from German subjects and admits that the cargo mentioned in the petition herein came into his possession from German subjects, and that he received his instructions as to shipment of the same from German subjects, but as to whether said cargo at the time he offered the same for shipment to the defendant was owned by German subjects as alleged in said answer, plaintiff has not

sufficient knowledge to form a belief and therefore leaves the said defendant to its proof thereof.

3d.

Replying to paragraph 12 of the said answer, plaintiff admits that defendant's agents, Jardine Matheson & Co., were prohibited and prevented by the authorities of the British Government from accepting and shipping the cargo offered by plaintiff **[14]** but alleges that this was because the said authorities of the British Government had placed the plaintiff on what was known as the British blacklist (the same being a list of neutrals with whom British subjects were prohibited from having business dealings) or because the said British authorities suspected that said cargo was owned by German subjects; but plaintiff alleges that notwithstanding such prohibition and prevention of the agents of the defendant by the authorities of the British Government the said defendant was not excused from its duty to accept and ship said cargo.

WHEREFORE, plaintiff claims judgment as prayed for in the petition herein.

L. EVERETT,
Plaintiff.

FLEMING and DAVIES,
Attorneys for Plaintiff.

United States Court for China,
Extraterritorial Jurisdiction in China,—ss.

Leonard Everett, being first duly sworn, deposes and says: I am the plaintiff in the above-entitled action; I have read the above and foregoing replication by myself and my attorneys subscribed and

know the contents thereof, and that the same is true to the best of my knowledge, information and belief.

L. EVERETT.

Subscribed and sworn to before me this 23 day of November, 1916.

PAUL McRAE,
Acting Clerk. [15]

In the United States Court for China.

Cause No. 507.

Civil No. 174.

LEONARD EVERETT,

Plaintiff,

vs.

SWAYNE & HOYT, INCORPORATED, a Corporation,

Defendant.

Filed December 28, 1916.

(Sgd.) PAUL McRAE,
Acting Clerk.

Opinion.

SYLLABUS.

1. Under the Anglo-American law, it is the duty of a common carrier to serve all applicants alike unconditionally and without discrimination.
2. Such a carrier is not justified in refusing to accept freight except on condition that the shipper obtains a third party's consent.
3. The carrier is relieved from such duty by the Act of God or the public enemy; but not by causes

which he can remove, nor, according to the weight of authority, by the acts of his own servants.

4. Nor is it a sufficient excuse for such refusal that the carrier's agents are subjects of a foreign power which prohibits trade with the applicant or his customers.
5. The applicant's measure of damages for such refusal is reimbursement for actual loss incurred and this includes assured profits from a pending contract.
6. It is not necessary for the applicant to prove that the carrier knew of such contract.
7. But against such profits must be charged any reduction which would result from shipping the goods by another available carrier.

Messrs. FLEMING & DAVIES, by Mr. FLEMING, for Plaintiff.

Messrs. JERNIGAN & FESSENDEN, by Mr. FESSENDEN, for Defendant. **[16]**

LOBINGIER, J.:

This is an action to recover damages from a common carrier for its alleged wrongful refusal to accept and transport goods. The petition avers and the answer admits that the defendant is an American corporation, and the steamship "Yucatan" an American freighter which

> "arrived at the port of Shanghai, China, on the 13th day of May, 1916, under charter from said owners to the said defendants for a voyage from the port of San Francisco, California, to ports

and places in China and Japan and return to San Francisco, and for other Pacific Coast ports of the United States. (Par. 4.)

That the said defendants through their said agents on the 3d day of May, 1916, and again on May 5, 1916, refused the plaintiff's said application for space and offer to ship as aforesaid by the said vessel on said voyage upon the ground that they did not have space available on said vessel, but that thereafter, to wit, on the 8th day of May, 1916, after plaintiff had called to the attention of said agents that they had allotted space to others applying at a date subsequent to the time of plaintiff's said application, the said agents of the defendants offered the plaintiff space on said vessel for said voyage provided the freight offered by the plaintiff should be passed by the British Consul at Shanghai and provided plaintiff did not offer more freight (or cargo) than the space at the disposal of said agents for the defendants. (Par. 10.)

That plaintiffs declined to agree to the aforesaid conditional acceptance of said offer by said defendants through their said agents in so far as it related to the approval of the British Consul at said Shanghai, and demanded that the defendants through their said agents accept said freight without said last-mentioned condition. That defendants through their said agents refused to comply with said demand." (Par. 11.)

By way of justification for this admitted refusal the answer alleges:

"That defendant's agents Jardine Matheson & Co. are British subjects and as such were prohibited and prevented by British Law and Orders in Council, rules, regulations and decrees of the British Government from dealing in any way directly or indirectly with German subjects, or their agents, or German enemy goods. (Par. 10.)

That plaintiff at the times mentioned in said petition was acting as an agent for German subjects and the cargo offered to Jardine Matheson & Co. defendant's agents by said plaintiff for shipment by the said steamship "Yucatan" was cargo owned by and belonging to German enemy subjects of Great Britain. (Par. 11.)

That defendant's agents Jardine Matheson & Co. were prohibited and prevented by the authorities of the British Government from accepting and shipping the cargo offered by plaintiff." (Par. 12.) **[17]**

Plaintiff in his replication,

"admits that defendant's agents, Jardine, Matheson & Company, were prohibited and prevented by the authorities of the British Government from accepting and shipping the cargo offered by plaintiff but alleges that this was because the said authorities of the British Government had placed the plaintiff on what was known as the British blacklist (the same being a list of neutrals with whom British subjects

were prohibited from having business dealings) or because the said British authorities suspected that said cargo was owned by German subjects." (Par. 3.)

Defendant having elsewhere admitted that "it was acting as a common carrier" and its refusal to accept plaintiff's freight being thus likewise admitted the naked legal question is presented whether the justification offered for such refusal is sufficient; for no testimony is produced except that of plaintiff and some depositions in support of the petition. The question of liability must, therefore, be determined largely upon the pleadings.

It is an ancient doctrine that

> "Common carriers owe to the public the duty of carrying indifferently for all who may employ them, and in the order in which the application is made, and without discrimination as to terms." [1]

The doctrine comes to us directly from the common law,[2] but is probably older, for there was a similar

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[1] 6 Cyc. 372. Cf. see 10 C. J., 66, and Covington Stock Yards Co. v. Keith, 139, U. S. 128, 35 Law ed. 73; Toledo, etc. R. Co. v. Wren, (Ohio), 84 N. E. 785.

[2] "The early law as to common carriers is thus given in a case of the date of 1683: 'Action on the case, for that whereas defendant is a common carrier from London to Lymmington *et abinde retrauum,* and setting it forth as the custom of England, that he is bound to carry goods, and that the plaintiff brought him such a pack, he refused to carry them tho offered his hire. And held by Jefferies, C. J., that the action is maintainable, as well as it is against an innkeeper for refusing a guest, or a smith on the road who refuses to shoe a horse,

one in the civil law[3] which the common law may have borrowed[4] and, each applies equally to carriers by land or, such as defendant, by water.[5]

Subject to the exceptions presently to be noted this duty is imperative. It cannot be evaded nor, on the whole, limited by contract.[6] Even where the commodity offered for shipment is under a general legal ban (as intoxicating liquor) the carrier cannot refuse to transport it if the particular consignee is not barred from receiving it.[7]

The grounds which will justify a refusal to perform the duty are few. Those usually enumerated in the books are, in the quaint language of the early common law, the "Act of God" (a catastrophe not due to human agency)[8] or of the public enemy.[9] The latter does not include mob violence.[10] Whether it includes a strike is a question on which the courts have divided. The existence of a strike by other than the carrier's employees, and which blocks all

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being tendered satisfaction for the same. Note, that it was alleged and proved that he had convenience to carry the same; and the plaintiff had a verdict.' Jackson v. Rogers, 2. Show, 327, 89 Eng. Reprint, 965." Jones' Blackstone's Commentaries, 1329.

[3] Hunter, Roman Law, 512; French Civil Code, Arts. 1782, 1952; Spanish Civil Code, Arts. 1601, 1783, 1784; 5 Corpus Juris, 378.

[4] But see *contra*, Cockburn, C. J., in Nugent v. Smith, 1 C. P. D. 423.

[5] 6 Cyc. 368. Cf. note 2, *supra*. [18]

[6] 6 Cyc. 392; 10 C. J., 66.

[7] Royal Brewing Co. v. Missouri etc. R. Co., 217 Fed. 146.

[8] Id. 377.

[9] 6 Cyc. 379.

[10] Id.

traffic, has been held to relieve the carrier of its duty to receive and transport freight.[11] But the decision[12] cited by defendant's counsel is the only one which we have been able to find to the effect that a strike of the carrier's *own employees* will afford such excuse. There is older and ampler authority[13] (ignored in that opinion) for the contrary doctrine. The question came before the New York Court of Appeals as early as 1859 in a case[14] where a railroad company sought to escape its common carrier's liability on the ground that its engineers had refused to work. In an opinion by an eminent Judge (DENIO) the Court said, in language quite apposite here:

> "The position that the defendants are not responsible, because the misconduct of their servants was willful and not negligent, cannot be sustained. The action is not brought on account of any injury done to the property by the engineers, but for an alleged nonperformance of a duty which the defendants owed to the owner

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[11] Louisville etc. R. Co. v. Queen City Coal Co., 99 Ky. 217, 35 S. W. 626.

[12] Murphy Hardware Co. v. Southern Ry. Co., — N. C. —, 64 S. E. 873.

[13] Blackstock v. N. Y. etc. R. Co., 20 N. Y. 48, 75 Am. Dec. 372, Cf Weed v. Panama R. Co., 17 N. Y. 362, 72 Am. Dec. 474; People v. N. Y. etc. R. Co., 28 Hun (N. Y.), 543; 9 Am. & Eng. R. Cas. 1; International etc. R. Co. v. Server, 3 Tex. App. Civ. Cas. sec. 440.

Such was also the Roman Law doctrine. Bowyer, Modern Civil Law, 276.

[14] Blackstock v. N. Y. etc. R. Co., 20 N. Y. 48, 75 Am. Dec. 372. [19]

of the property. If their inability to perform was occasioned by the default of persons for whose conduct they are responsible, they must answer for the consequences, without regards to the motives of those persons. * * *

Those who intrust their goods to carriers have no means of ascertaining the character or disposition of their subordinate agents or servants; they have no agency in their selection, and no control over their actions. * * *

Being a corporation, all their business must necessarily be conducted by agents, and if they are not liable for their acts and omissions, parties dealing with them have no remedy at all."

In a similar case [15] arising in Illinois the supreme court of that state said:

"It is, doubtless, the law, that railway companies cannot claim immunity from damages for injuries resulting in such cases from the misconduct of their employees, whether such misconduct be willful or merely negligent. If employees of a common carrier suddenly refuse to work, and the carrier promptly supply their places with other employees, and injury results from the delay, the carrier is responsible, such delay results from the fault of the employees."

"It is a well settled principle of law," observed Mr. Justice Biddle,[16] "that a delay caused by a

[15] Pittsburgh etc. R. Co. v. Hazen, 84 Ill. 36, 25 Am. Rep. 422.

[16] Pittsburgh etc. R. Co. v. Hollowell, 65 Ind. 188, 32 Am. Rep. 63. **[20]**

> '*strike*' or mob composed solely of the employees of a railroad company * * * will not excuse the company from receiving freight according to its contract or public duty."

The two latter quotations are *obiter dicta* but they serve to disclose an attitude of the Courts elsewhere quite inconsistent with that expressed in the North Carolina case relied upon by defendant's counsel and appear to us to state the sounder and better doctrine. And while the facts above reviewed are not strictly parallel to those in the case at bar, still if a carrier is not relieved of liability by conduct of its employees which is contrary to its orders it would seem *a fortiori* that exemption could not be claimed where, as here, the agent's acts are not disavowed by the carrier.

Under all the authorities, moreover the obstacle which will excuse the carrier must be one which he cannot remove with proper care. Not even an "Act of God" will relieve him if his own negligence, contributed effectively to the result.[17] So, altho a *bona fide* lack of shipping facilities will excuse the carrier,[18] it must appear that he has used ordinary care to supply them not only from the locality in question but from others[19] and it is no defense that he has

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[17] St. Louis etc. R. Co. v. Dreyfus, 43 Oka. 401, 14 Pac. 773; Georgia etc. R. Co. v. Barfield (Ga. 1907), 58 S. E. 236; Ferguson v. Southern R. Co., 91 S. C. 61, 74 S. E. 129.

[18] Hutchinson, Carriers, II, sec. 495.

[19] "For aught the evidence shows to the contrary, the appellant, by the use of ordinary care, could have sent in cars from other division points, without dis-

failed to provide them or has depended unsuccessfully upon another.[20] In a recent Pennsylvania case[21] it was observed:

> "That the refusal to allow plaintiffs a siding connection was an undue and unreasonable discrimination against them was too clearly established to admit of question. The congested condition of traffic on defendant's road, which was offered in explanation, afforded neither excuse nor extenuation. *The means of protection against such condition was in defendant's own hands.* It was under no duty to haul more

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commoding shippers at those points, in order to supply the temporary needs of shippers at the station of Pryatt.

Although the demand for stock cars was great and unusual on the divison on which Pryatt is situated during the time appellees were seeking to ship their cattle, it was the duty of the appellant to endeavor to meet this unusual demand and to satisfy the requirements of shippers from that station by exercising ordinary care to have the need supplied." St. Louis etc. R. Co. v. Keep, — Mo. —, 168 S. W. 131.

[20] "It was the duty of the defendant as a common carrier to furnish reasonable facilities for the transportation of commodities along its line. The fact that it had no cars at the time of its purchase of the road, or the fact that another company had failed to supply its cars, is not sufficient answer to this requirement, unless it be shown that reasonable facilities had been provided for the procurement of cars from another company, which had proved inefficient on account of the unprecedented and unexpected emergency." Missouri etc. R. Co. v. Sneed, 85 Ark. 293, 107 S. W. 1182.

[21] Cox v. Pennsylvania R. Co., — Pa. —, 85 Atl. 863. **[21]**

coal than could safely and conveniently be transported over its line; but a bounden duty did rest upon it, in limiting the amount to be accepted by it, because of extraordinary conditions, to show no preference as between shippers, and to treat all alike on some equitable basis."

Applying to the case at bar these principles (for no precedent on all-fours with this case has been cited or found) we must inquire whether defendant used sufficient care to avoid the situation which led it to refuse plaintiff's cargo. As we have seen their averment is that their agents were prohibited by their (not defendant's) national authorities from accepting it. But there is no claim that this prohibition was legally effective against defendant or that it could not easily have employed other agents who were exempt therefrom. In the language of the opinion last cited, therefore, "the means of protection against such condition was in defendant's own hands." And wherever such is the case the common carrier's liability continues.

We have seen, too, that the carrier cannot shift the responsibility to his employees, even where they defy his orders and assume an attitude adverse to him. There is no averment here that the acts of defendant's agents were such. For aught that appears the agents' policy was also that of the principal.

The briefs contain considerable discussion as to how far the agent's knowledge may be imputed to the principal. It may be conceded that defendant was not presumed to know the British Enemy Trading Acts but it is hard to conceive of knowledge more

important for its agents to communicate than their own restrictions as to those from whom they were permitted to accept freight. Clearly this is a matter which they should have reported to defendant and, as a rule, what they should have done they are, as regards plaintiff, conclusively presumed to have done.[22]

But aside from this presumption we do not see that it would aid defendant if it were proven positively that its agents did not so inform it and that it remained ignorant of the fact that its agents would not accept freight from all who might apply. That would merely show that the agents were acting adversely to their principal, which, as we have seen, will not according to the weight of authority, relieve the latter from liability.

Defendant emphasizes in its brief the fact that its "agents offered to accept the cargo provided plaintiff could procure the consent of the British Consul." But that was a *condition;* and, as we have seen, a common carrier must serve all *unconditionally* and equally, and while the common law may have been modified for the British Empire by the recent Enemy Trading Acts these have no application to Americans. Moreover the testimony (Walker's Deposition) shows that others were given space without conditions. Indeed, the petition (par. 8) alleges and the answer (par. 4) admits that defendant was "accepting offers for an allotting space to the public generally." Besides it seems clear that the agents knew plaintiff could not meet the condition.

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[22] 31 Cyc., 1451, 1640, 1587. [22]

We must find, therefore, that defendant has not shown exemption from its common carrier's obligation; that its duty was to receive plaintiff's freight; and that, by its refusal, it incurred liability.

II.

The measure of damages for such refusal varies according to the status of the applicant. If he is the owner of the goods offered for shipment and the object is a sale at the destination, he is entitled to the difference between the market price at the latter and that prevailing at the point of application, less freight charges.[23] To this is sometimes added the element of depreciation while the goods are awaiting shipment,[24] [23] and always the award must be such as will reimburse the applicant for actual loss.[25] Thus he is entitled to recover any profits he would have realized from the refused shipment.[26] In a

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[23] 6 Cyc. 375, note 72; Hutchinson, Carriers, III, sec. 366; St. Louis etc. R. Co. v. Leder Bros., — Ark., —, 112 S. W. 744; Toledo etc. R. Co. v. Wren, 78 Ohio St., 137, 84 N. E. 785.

[24] Shoptaugh v. St. Louis etc. R. Co. (Mo. Appl.), 126 S. W. 752.

[25] *Delaware.* Williams v. Armour Car Lines (Del. 1908), 79 Atl. 919.

Kentucky. Louisville etc. R. Co. v. Ohio Valley R. Co., (Ky. 1914) 170 S. W. 633.

Mississippi. Parish v. Yazoo etc. R. Co. (Miss. 1913), 60 So. 322.

Pennsylvania. Hillsdale Coal & Coke Co. v. Pennsylvania R. Co., 229 Pa. 61, 78 Atl. 28.

Texas. Missouri etc. R. Co. v. Empire Express Co. (Tex. Civ. App.), 173 S. W. 222.

[26] Houston etc. R. Co. v. Campbell, 91 Tex. 551; 45 S. W. 2; Houston etc. R. Co. v. Hill, 70 Tex. 51, 7 S. W. 659; Louisville etc. R. Co. v. Queen City Coal Co., 13 Ky. Law Rep. 832.

case[27] where a coal company had been refused proper facilities by a common carrier the Supreme Court of Pennsylvania approved the following instruction to the jury:

> "As we look at it, the only known method to get data from which to estimate what a man is damaged by reason of discrimination in not furnishing cars or other facilities of transportation is to give the shipper discriminated against what would have been a reasonably fair profit on whatever is shown to be the fairly probable output of the mine discriminated against, less what was actually shipped from such mine."

The same authority quotes with approval this statement of the doctrine by the Supreme Court of Michigan:

> "The profits lost constitute the legitimate measure of damages. The law is not so blind to justice as not to require the defendant to respond in damages, if there is any reasonable basis for their ascertainment." [28]

In the case at bar plaintiff was not the owner of the goods offered for shipment and hence could not claim the measure of damages applicable to transportation for sale. But we think it clear from the authorities just reviewed that he is entitled to reimbursement for the loss incurred by the refusal of shipment, including profits therefrom. Another

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[27] Hillsdale Coal & Coke Co. v. Pennsylvania R. Co., 229 Pa. 61, 78 Atl. 28.

[28] Hitchcock v. Supreme Tent, 100 Mich. 40, 58 N. W. 640. [24]

case[29] quite analogous in principle was one where plaintiff had contracted to sell railway excursion tickets in reliance upon the defendant company's promise to issue an unlimited number. It was held that the measure of plaintiff's damage for defendant's nonperformance was the profit the former would have received from the tickets he had sold.

It is admitted (p. 8) that defendant's freight rates on the "Yucatan" were G.$16.50 per ton. But it is undisputed that plaintiff had made contracts with his customers by which he was to receive G.$30. per ton for what he should ship for them. It appears (pp. 8, 12) that these contracts were entered into when freight rates were high in Shanghai and that by the time application for space was made to defendant there had been a fall of almost one-half—a situation so much a part of local history that this court might almost take judicial notice thereof.

There is nothing to indicate that defendant or its agents knew of plaintiff's contracts with his customers. But that was not necessary.[30] Nor was there any speculative element in plaintiff's profits. In some of the cases above cited prospective profits were allowed on estimated sales and probable contracts. But here the contracts were actually made and the proceeds susceptible of exact calculation and it seems to us that the carrier's refusal was an even more direct and proximate cause of the loss of these profits than in the authorities heretofore cited.

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[29] Houston etc. R. Co. v. Hill, 70 Tex. 51, 7 S. W. 659.

[30] Houston etc. R. Co. v. Campbell, 91 Tex. 551, 45 S. W. 2. [25]

But we also think that something must be charged against these profits. Defendant's counsel contends that the true measure of damages here "could only be the difference between the rate at which defendant's agents accepted cargo from other shippers and the rate actually paid by plaintiff to ship his cargo by other steamers." He cites no case in which this rule is applied, but it seems reasonable to require that an applicant who is refused service by one common carrier should not charge the whole damage upon the latter if another is ready to provide service which will prevent, or at least reduce, the damage. Such a principle obtains in the law of Master and Servant;[31] it seems equitable and sound and we see no reason why it should not also be applied here.

Plaintiff testifies in response to his counsel's questions:

"Q. You had this cargo for shipment at $30 a ton?

A. Yes.

Q. What ultimately became of it, did you ship it?

A. No, Arnold Karberg shipped it by some people in Kobe. They shipped the cargo to Kobe and afterwards shipped it to America and I had the cargo from the Tientsin firm shipped to Kobe for transfer to America, but I made no profit on it and the services were absolutely without remuneration, I

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[31] 26 Cyc. 1006, 1014. "When the defendant knew that the transportation would not be furnished, he was not bound, in order to recover for the wrong done him, to prepare and offer the wood. As argued by his counsel, it was his duty to pursue that course best calculated to lessen the damage resulting from the wrong." Houston etc. R. Co. v. Campbell, 91 Tex. 551, 45 S. W. 2. [26]

lost the business and the profit, besides it took up a lot of time and trouble."

On cross-examination he states further:

"Q. You assisted in shipping the Arnold Karberg cargo thru to Japan?

A. Yes, it was done in my name and sent to the godown and insured in my name, and I can vouch that it was not in the name of Arnold Karberg who made the arrangement.

Q. In name you were the shipper.

A. As forwarding agent."

* * * * * * * * *

Q. Altho you could not ship it yourself still the German firm could ship it?

A. Yes, they did it thru a Japanese firm and it was not shipped in their own name.

Q. You made no effort to ship it yourself?

A. Well, I did, but they were satisfied to take it over and did it themselves."

On being asked "the rate across the Pacific" for this shipment he replied:

"I estimate between $25 and $26 including all things such as lighterage, commissions."

Elsewhere he says:

"If I could get the cargo away by the Yucatan at $16½ why should I go to the Japanese lines for $25 or $26 a ton?"

It seems clear from this that plaintiff's customer was given a rate by the Japanese Company about G.$4.50 per ton less than that fixed in the contract with plaintiff, tho the shipment was made in his name at least as "forwarding agent." He admits in effect

(pp. 10, 13), that he did not ask, and hence was not refused, space from said company for this particular cargo, and without a positive showing to that effect, we think it would be inequitable to charge upon the defendant more than the difference beween its rate and that of the Japanese Company which would be about G.$9 per ton.

On the other hand, we do not think defendant has shown that other shipping facilities were available to plaintiff at the time. After stating that "The British firms and their allies would not do business with me," plaintiff testifies:

"Q. When the 'Yucatan' shut out that cargo you took no efforts to ship by other lines and dropped the matter?

A. No, I beg to differ there. I tried to make negotiations or arrangements with Anderson, Meyer and other steamship people.

Q. You restricted your efforts to American steamers?

A. Yes, I might say that I tried to get a Vladivostock steamer, but the 'Yucatan' was the only vessel I could take advantage of." [27]

We might almost take judicial notice that the lines mentioned in plaintiff's testimony included all of these then operating and the burden was on defendant to show that the Japanese Company was not the only one open to plaintiff.[32] We must therefore find that he is entitled to recover as damages for defendant's refusal the difference between its rate and that

[32] 26 Cyc., 1006. [28]

of the Japanese Company which was, as we have seen G.$9 per ton. As it is admitted that three hundred tons were offered the whole would amount to G.$2,700.

It is accordingly considered and adjudged that plaintiff have and recover from defendant the sum of two thousand seven hundred dollars United States currency together with his costs.

By the Court.

CHARLES S. LOBINGIER,
Judge.

COPY.

In the United States Court for China.

Cause No. 507.

Civil No. 174.

LEONARD EVERETT,
Plaintiff,

vs.

SWAYNE and HOYT, INCORPORATED,
Defendant.

Filed at Shanghai. June 9, 1917.

EARL B. ROSE.
Clerk.

Petition for Writ of Error.

Now comes the defendant Swayne and Hoyt, Incorporated, and says that on or about the 28th day of December, 1916, this Court entered judgment herein in favor of the plaintiff and against the defendant, in which judgment and the proceedings had prior thereto in this cause certain errors were com-

mitted, to the prejudice of this defendant, all of which will in more detail appear from the assignment of errors which is filed with this petition.

WHEREFORE this defendant prays that a writ of error may issue in this behalf out of the United States Circuit Court of Appeals for the Ninth Judicial Circuit for the correction of errors so complained of, and that a transcript of the record proceedings, and papers in this cause, duly authenticated, may be sent to the said Circuit Court of Appeals.

(Sgd.) JERNIGAN & FESSENDEN,
Attorneys for Defendant. [29]

COPY.

In the United States Court for China.
Cause No. 507.

Civil No. 174.

LEONARD EVERETT,
Plaintiff,

vs.

SWAYNE and HOYT, INCORPORATED,
Defendant.

Filed at Shanghai. June 9, 1917.
EARL B. ROSE.
Clerk.

Defendant's Bill of Exceptions.

BE IT REMEMBERED that on the 12th day of June 1916, the defendant by its counsel, Jernigan and Fessenden, filed of record, its general appearance in the above-entitled action.

Be it further remembered that on the 17th day of July, 1916, the above-entitled cause came on for hearing upon a demurrer filed by the defendant demurring to the petition of plaintiff herein on the ground that it appears on the face of the petition filed of record by the plaintiff herein that the Court has not jurisdiction of the person (corporate) of the defendant which said demurrer is in the following form, to wit:

In the United States Court for China.

LEONARD EVERETT,

Plaintiff,

vs.

SWAYNE and HOYT, INC.,

Defendant.

DEMURRER.

The defendant above named appearing by Jernigan and Fassenden, its attorneys, demurs to the petition hereon on the ground that it appears upon the face of the petition that the Court has not jurisdiction of the person of the defendant, in that it appears from said petition that defendant is a corporation organized and existing under the laws of the State of California, United States of America, and having its principal office and place of business at San Francisco in said State of California, and it does not appear from said petition that said defendant has any office, branch, place of business or property in China, or any official, agent, or representative residing or being in China over whom this Court has jurisdiction.

Dated at Shanghai, June 15th, 1916.

JERNIGAN and FASSENDEN,
Counsel for Defendant. [31]

And be it further remembered that on the 17th day of July, 1916, the opinion and order of the Court overruling said demurrer were duly entered of record to which said order the defendant did then and there except which said exception was duly allowed by the Court.

And be it further remembered that on the 23d day of November, 1916, the above-entitled cause comes on for hearing and was heard and tried upon the facts as admitted in the petition, answer and replication filed of record herein except as follows: evidence was introduced in proof of the allegation that plaintiff had on hand under contract for shipment to Pacific Coast Ports of America 400 tons of cargo as alleged in paragraph seven of said petition; evidence was introduced in proof of the damages alleged in the petition; no evidence was introduced to prove the allegations contained in paragraph eleven of defendant's answer that the cargo offered for shipment by plaintiff was owned by German subjects. The said petition, answer and replication are in the following form, to wit:

In the United States Court for China.

LEONARD EVERETT,

Plaintiff,

vs.

SWAYNE and HOYT, INC.,

Defendant.

PETITION.

The petition of the above-named plaintiff respectfully represents to this Honorable Court.

1. That the plaintiff is an American citizen, a resident of Shanghai, China, and is engaged in the business of shipping at said Shanghai.

2. That the defendant is a corporation duly incorporated under the laws of the State of California, United States of America, with its principal office and place of business at San Francisco, in said State. [32]

3. That the steamship "Yucatan" is an ocean-going steam freighter owned by the North Pacific Steamship Company an American corporation, and that said vessel is registered under the laws of the United States of America at the port of San Francisco, California.

4. That the said SS. "Yucatan" arrived at the port of Shanghai, China, on the 13th day of May, 1916, under charter from said owners to the said defendants for a voyage from the port of San Francisco, California, to ports and places in China and Japan and return to San Francisco, and for other Pacific Coast ports of the United States of America.

5. That Jardine, Matheson & Company, Limited, a British corporation, were and are agents for said defendants at said Shanghai.

6. That prior to the arrival of said vessel at said Shanghai, to wit, on or about the 18th day of April, 1916, and from day to day thereafter until on or about the 5th day of May, 1916, the said defendants through their said agents advertised in the public

press of said Shanghai that said vessel would be put on the berth at said Shanghai and that applications for freight for a voyage to the port of San Francisco might be made to the said agents.

7. That on the 3d day of May, 1916, the plaintiff applied to defendants through their said agents for space on said vessel for from 200 to 300 tons (measurement)of freight from said Shanghai to any port on the Pacific Coast of America that said vessel might be destined for; that plaintiff as a shipping contractor actually had on hand at the time said offer was made and now has on hand under contract for shipment for others to Pacific Coast ports of the United States of America over 400 tons (measurement) of cargo consisting principally of hides and skins, and was desirous of shipping the said cargo to any Pacific Coast port of the United States of America and was ready and willing to pay the defendants reasonable and ordinary charges for the freight so offered.

8. That at the time said offer was made the said defendants, through their said agents, were accepting offers for and allotting space to the public generally and had at the time said offer was made by [33] plaintiff sufficient space available in said vessel to meet the requirements of said offer.

9. That the said defendants in placing the said steamer on the berth in Shanghai as aforesaid and in advertising for applications for space for freight for a voyage of said vessel from Shanghai to San Francisco, and in accepting the same from the public generally were common carriers of freight for hire and

as such were bound to accept plaintiff's said offer.

10. That the said defendants, through their said agents, on the 3d day of May, 1916, and again on May 5, 1916, refused the plaintiff's said application for space and offer to ship as aforesaid by the said vessel on said voyage upon the ground that they did not have space available on said vessel, but that thereafter, to wit, on the 8th day of May, 1916, after plaintiff had called to the attention of said agents that they had allotted space to others applying at a date subsequent to the time of plaintiff's said application, the said agents of the defendants offered the plaintiff space on said vessel for said voyage provided the freight offered by the plaintiff should be passed by the British Consul at Shanghai and provided plaintiff did not offer more freight (or cargo) than the space at the disposal of said agents for the defendants.

11. That plaintiff declined to agree to the aforesaid conditional acceptances of said offer by said defendants, through their said agents, in so far as it related to the submission of the freight offered by plaintiff to the approval of the British Consul at said Shanghai, and demanded that the defendants, through their said agents, accept said freight without said last-mentioned condition. That defendants through their said agents refused to comply with said demand.

12. That plaintiff has been damaged by the acts and conduct of said defendants to the amount of the difference between the price at which plaintiff had contracts with others for the shipment of said freight

and the price at which the said defendants were [34] accepting freight of a similar character from the public at Shanghai, China, and that said difference is the sum of Four Thousand Five Hundred ($4,500) Dollars, United States gold coin.

WHEREFORE plaintiff prays for judgment against said defendant for said sum of Four Thousand Five Hundred ($4,500) Dollars, United States gold coin, for costs, and for such other further or different relief as to the Court may seem meet.

Dated Shanghai, May 15, 1916.

LEONARD EVERETT,
Plaintiff.

FLEMING and DAVIES,
Attorneys for Plaintiff.

United States Court for China,
Extraterritorial Jurisdiction in China.—ss.

Leonard Everett, being first duly sworn, deposes and says: That he has read the above and foregoing petition by him subscribed and knows the contents thereof, and that the same is true to the best of his knowledge, information and belief.

EARL B. ROSE,
Clerk of the United States Court for China.

May 17, 1916.

In the United States Court for China.

LEONARD EVERETT,
Plaintiff,

vs.

SWAYNE and HOYT, INCORPORATED, a Corporation,
Defendant.

ANSWER.

Defendant in answer to the petition of plaintiff herein respectfully shows to the Court and alleges as follows:

1. Defendant admits the allegations set forth in paragraphs one to five inclusive of said petition. [35]

2. In answer to paragraph six of said petition, defendant alleges that the advertisement in the public press as in said paragraph set forth was made in the name of Jardine Matheson & Co.

3. In answer to paragraph seven of said petition, defendant admits that plaintiff applied to Jardine Matheson & Co. for space on said vessel as in said paragraph alleged, but defendant has no knowledge or information sufficient to form a belief as to the truth of the other allegations in said paragraph seven set forth and therefore denies same.

4. Defendant admits the allegations set forth in paragraph eight of said petition.

5. In answer to paragraph nine of said petition, defendant admits that it was acting as a common carrier, but denies that it was bound to accept plaintiff's offer for reasons hereinafter set forth.

6. In answer to paragraph ten of said petition, defendant admits that its agents Jardine Matheson & Co. refused plaintiff's application for space on said vessel and subsequently offered to accept plaintiff's freight upon conditions which were refused by plaintiff as in said paragraph ten set forth.

7. Defendant admits that its agents Jardine Matheson & Co. refused to comply with plaintiff's

demand as in paragraph eleven of said petition alleged.

8. Defendant denies each and every allegation set forth in paragraph twelve of said petition.

9. And defendant further alleges that at the time mentioned in plaintiff's petition a state of war existed between Great Britain and Germany.

10. That defendant's agents Jardine Matheson & Co. are British subjects and as such were prohibited and prevented by British law and Orders in Council, rules, regulations and decrees of the British Government from dealing in any way directly or indirectly with German subjects, or their agents, or German enemy goods.

11. That plaintiff at the times mentioned in said petition was acting as an agent for German subjects and the cargo offered [36] to Jardine Matheson & Co., defendants' agents by said plaintiff for shipment by the said SS. "Yucatan" was cargo owned by and belonging to German enemy subjects of Great Britain.

12. That defendant's agents Jardine Matheson & Co. were prohibited and prevented by the authorities of the British Government from accepting and shipping the cargo offered by plaintiff.

13. That neither defendant nor its agents Jardine Matheson & Co. have committed any tort or breach of legal duty or obligation to plaintiff.

WHEREFORE defendant prays that the petition herein be dismissed with costs and for such other and

further relief as to the Court may seem meet.

JERNIGAN and FASSENDEN,
Counsel for Defendant.

Shanghai, China.

On this 20 day of July, 1916, before me personally came Vivian Hugo Lanning, who being by me duly sworn did depose and say that he is clerk of the shipping department of Jardine Matheson & Co.; that he has read the foregoing answer and knows the contents thereof, and that the matters therein alleged are true to the best of his knowledge, information and belief.

(Sgd.) VIVIAN HUGO LANNING,

Subscribed and sworn to before me this 20th day of July, 1916.

EARL B. ROSE,
Clerk of the United States Court for China.

In the United States Court for China.

LEONARD EVERETT,

Plaintiff,

vs.

SWAYNE and HOYT, INCORPORATED, a Corporation,

Defendant.

REPLICATION. [37]

Now comes the plaintiff herein and in reply to the Answer of the defendant herein:

1. Admits the allegations contained in paragraphs 9 and 10 of said answer.

2. In reply to paragraph 11 of said answer, plaintiff admits that as a part of his business as shipping

agent he has accepted cargo from German subjects, and admits that the cargo mentioned in the petition herein came into his possession from German subjects, and that he received his instructions as to shipment of the same from German subjects, but as to whether said cargo at the time he offered the same for shipment to the defendant was owned by German subjects as alleged in said answer, plaintiff has not sufficient knowledge to form a belief and therefore leaves the said defendant to its proof thereof.

3. Replying to paragraph 12 of said answer, plaintiff admits that defendant's agents Jardine Matheson & Co. were prohibited and prevented by the authorities of the British Government from accepting and shipping the cargo offered by plaintiff, but alleges that this was because the said authorities of the British Government had placed the plaintiff on what was known as the British blacklist (the same being a list of neutrals with whom British subjects were prohibited from having business dealings) or because the said British authorities suspected that said cargo was owned by German subjects; but plaintiff alleges that notwithstanding such prohibition and prevention of the agents of the defendant by the authorities of the British Government the said defendant was not excused from its duty to accept and ship said cargo.

WHEREFORE plaintiff claims judgment as prayed for in the petition herein.

LEONARD EVERETT,
Plaintiff.

FLEMING and DAVIES,
Counsel for Plaintiff.

United States Court for China,
Extraterritorial Jurisdiction in China,—ss.

Leonard Everett, being first duly sworn, deposes and says: [38] I am the plaintiff in the above-entitled action; I have read the above and foregoing replication by myself and my attorneys subscribed and know the contents thereof, and that the same is true to the best of my knowledge, information and belief.

(Sgd.) L. EVERETT.

Subscribed and sworn to before me this 23 day of November, 1916.

(Sgd.) PAUL McRAE,
Acting Clerk.

And it be further remembered that on the 28th day of December, 1916, the opinion and final judgment of the Court were duly entered of record, from which said final judgment the defendant appeals in pursuance of the statutes in such cases made and provided.

And now in furtherance of justice and that right may prevail, the defendant presents the foregoing bill of exceptions and prays that the same may be settled, allowed, and signed and certified by the Judge of this court in the manner provided by law.

JERNIGAN and FESSENDEN,
Attorneys for Defendant.

Service of a copy of the within bill of exceptions admitted this 8th day of June, 1917.

FLEMING and DAVIES,
Attorneys for Plaintiff. [39]

COPY.

In the United States Court for China.

Cause No. 507.

Civil No. 174.

LEONARD EVERETT,

Plaintiff,

vs.

SWAYNE and HOYT, INCORPORATED,

Defendant.

Filed June 19, 1917.

EARL B. ROSE,
Clerk.

Order Settling, etc., Bill of Exceptions.

Be it remembered that on the 9th day of June, 1917, the above-named defendant presented its Bill of Exceptions to the undersigned for settlement. And it appearing to the Court from examination of said Bill of Exceptions that the same contains all the relevant proceedings at the hearing of said cause and that all the exceptions therein set forth were taken as in said Bill of Exceptions recited, and that wherever in said Bill of Exceptions an exception was taken by the said defendant the same was allowed by the Court. And it further appearing that the said Bill of Exceptions is in all respects full, true and correct,—

NOW, THEREFORE, that the same is hereby approved, allowed and settled as the Bill of Excep-

tions in the above-entitled cause and made a part of the record herein.

Dated at Shanghai this 19th day of June, 1917.

(Sgd.) CHARLES S. LOBINGIER,
Judge of the United States Court for China. [41]

COPY.

In the United States Court for China.

Cause No. 507.

Civil No. 174.

LEONARD EVERETT,

Plaintiff,

vs.

SWAYNE and HOYT, INCORPORATED,

Defendant.

Filed at Shanghai, June 9, 1917.

EARL B. ROSE,
Clerk.

Assignment of Errors.

Now comes the defendant Swayne and Hoyt, Incorporated, and in connection with its petition for a writ of error assigns the following errors upon which it will rely:

1. That the Court erred in overruling defendant's demurrer to plaintiff's petition,—

FIRST: Because it appears upon the face of said petition that the Court has not jurisdiction over the defendant corporation.

SECOND: Because an American corporation not regularly established in business in China and hav-

ing no office, place of business or property in China and conducting such business as it may do in China through agents who are British subjects is not within the extraterritorial jurisdiction in China of the United States or of the United States Court for China in the sense such extraterritorial jurisdiction is understood, created or established by the treaties between the United States and China or the statutes of the United States creating and prescribing the jurisdiction of the United States Court for China.

2. The Court erred in its judgment in holding and deciding that the fact that the British agents in China of defendant were prevented by British trading with enemy regulations and by the British law and authorities from accepting cargo for shipment by defendant's steamship did not exempt defendant from its liability as a common carrier to accept cargo tendered by plaintiff. [42]

3. The Court erred in its judgment in not holding and deciding that any law or rules or regulations to which defendant's agents in a foreign country (China) are subject which make it unlawful for said agents to accept cargo from plaintiff for shipment by defendant's vessel exonerates defendant from liability to plaintiff for the acts of its agents in refusing to accept such cargo.

4. The Court erred in its judgment in holding and deciding that defendant was not prevented from accepting plaintiff's cargo by causes beyond the control of defendant of such a character as to exempt defendant from liability to plaintiff.

5. The Court erred in entering judgment against the defendant and in favor of the plaintiff.

6. The Court erred in not entering judgment in favor of the defendant and against the plaintiff.

JERNIGAN and FESSENDEN,
Counsel for Defendant.

Due service of the above and foregoing assignment of errors admitted this 8th day of June, 1917.

FLEMING and DAVIES,
Counsel for Plaintiff. [43]

In the United States Court for China.

Cause No. 507.

Civil No. 174.

LEONARD EVERETT,
Plaintiff,

vs.

SWAYNE and HOYT, INCORPORATED,
Defendant.

Filed at Shanghai, June 9, 1917.

EARL B. ROSE,
Clerk.

Order Allowing Writ of Error and Fixing Amount of Bond.

This 9th day of June, 1917, came the defendant by its attorneys, Jernigan and Fessenden, and filed herein and presented to the Court its petition for the allowance of a writ of error, an assignment of errors intended to be urged by it, praying also that a transcript of the record, proceedings and papers upon

which the judgment herein was rendered, duly authenticated, may be sent to the United States Circuit Court of Appeals for the Ninth Circuit, and that such other and further proceedings may be had as may be proper in the premises.

On consideration whereof, the Court does allow the writ of error upon defendant paying into court in accordance with a stipulation of record herein made and entered into by and between counsel for the respective parties hereto the sum of Three Thousand Five Hundred (3500) Dollars, United States currency, the payment of which said sum into court as aforesaid shall operate in lieu of a supersedeas bond.

(Sgd.) CHARLES S. LOBINGIER,
Judge of the United States Court for China. [45]

In the United States Court for China.

Cause No. 507.

Civil No. 174.

LEONARD EVERETT,

Plaintiff,

vs.

SWAYNE and HOYT, INCORPORATED.

Filed at Shanghai, June 19, 1917.

EARL B. ROSE,
Clerk.

Writ of Error.

The United States of America,—ss.

The President of the United States of America: To the Honorable Judge of the United States Court for China, Greeting:

Because in the record and proceedings as also in the condition of the judgment of a plea which is in the said United States Court for China, before you, between Leonard Everett, plaintiff, and Swayne and Hoyt, Incorporated, defendant, a manifest error hath happened to the great damage of the said Swayne and Hoyt, Incorporated, as is said and appears by its complainant: We being willing that such error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal distinctly and openly, you send the records and proceedings aforesaid with all things concerning the same, to the Justices of the United States Circuit Court of Appeals for the Ninth Circuit at the courtrooms of said Court in the city of San Francisco, together with this writ, so that you have the same at the said place, before the Justices aforesaid, on the 18th day of July, 1917, that the record and proceedings aforesaid being inspected, the said Justices of the said Circuit Court of Appeals may cause further to be done therein, to correct that error, what of right and according to the law and custom of the United States ought to be done. [47]

WITNESS the Honorable EDWARD D. WHITE, Chief Justice of the Supreme Court of the United States, this 19th day of June, in the year of our Lord one thousand nine hundred and seventeen.

Allowed by

CHARLES S. LOBINGIER,
Judge of the United States Court for China.

Attest: EARL B. ROSE,
Clerk of the United States Court for China. [48]

In the United States Court for China.

Cause No. 507.
Civil No. 174.

LEONARD EVERETT,
Plaintiff,

vs.

SWAYNE and HOYT, INCORPORATED,
Defendant.

Filed at Shanghai, June 19, 1917.

EARL B. ROSE,
Clerk.

Citation on Writ or Error.

The United States of America,—ss.

To Leonard Everett, Greeting:

You are hereby cited and admonished to be and appear at a session of the United States Court of Appeals for the Ninth Circuit to be holden at the city of San Francisco, on the 18th day of July next, pursuant to a writ of error filed in the clerk's office of the United States Court for China, wherein

Swayne and Hoyt, Incorporated, is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

WITNESS the Honorable CHARLES S. LOBINGIER, Judge of the United States Court for China, this 19th day of June, 1917.

EARL B. ROSE,
Clerk of the United States Court for China.

We hereby, this —— day of ——, 1917, accept due personal service of this citation on behalf of Leonard Everett, defendant in error.

_____,
Counsel for Defendant in Error. **[50]**

City of Shanghai, to wit:

I hereby certify that I received the within citation at 10 o'clock A. M. on July 7th, 1917, and that I personally served it upon Leonard Everett, in his office, at 1A Jinkee Road, Shanghai, at 10:30 o'clock A. M. July 7th, 1917 by showing it to him and delivering to him a copy thereof.

Given under my hand this the 7th day of July in the year, 1917.

PAUL McRAE,
Marshal of the United States Court for China. **[51]**

COPY.

In the United States Court for China.

Cause No. 507.
Civil No. 174.

LEONARD EVERETT,
Plaintiff,

vs.

SWAYNE and HOYT, INCORPORATED,
Defendant.

Filed at Shanghai, June 9, 1917.
EARL B. ROSE,
Clerk.

Stipulation for Payment of Money into Court in Lieu of Supersedeas Bond on Appeal.

It is hereby stipulated by and between the undersigned counsel for the respective parties in the above-entitled cause that in lieu of executing a supersedeas bond the said defendant shall pay into this Court the sum of Three Thousand Five Hundred Dollars ($3,500), United States currency which said sum may be deposited in bank by the Court and which said sum shall be held by the Court upon the condition that if the above-named defendant shall prosecute its writ of error against the judgment entered of record in the above-entitled action to effect and shall answer all damages and costs that may be awarded against it in event of its failure to secure a reversal of said judgment, then the above-named sum of money shall be returned to said defendant; otherwise the amount of said judgment and costs

and the costs of said appeal shall be paid to the said plaintiff out of the aforesaid sum and the overplus, if any there be, shall be returned to the said defendant.

FLEMING and DAVIES,
Counsel for Plaintiff,
JERNIGAN and FESSENDEN,
Counsel for Defendant. **[52]**

COPY.

In the United States Court for China.

Cause No. 507.
Civil No. 174.

LEONARD EVERETT,
Plaintiff,

vs.

SWAYNE and HOYT, INCORPORATED,
Defendant.

Filed at Shanghai, June 9, 1917.
EARL B. ROSE,
Clerk.

Praecipe for Transcript.

To the Clerk of the Above-entitled Court:

You are hereby requested to prepare a transcript of the record herein to be filed in the United States *Circuit of* Appeals for the Ninth Circuit pursuant to a writ of error allowed in the above-entitled cause and to include in said transcript the following pleadings, proceedings and papers on file, to wit:

1. Petition.
2. Demurrer.
3. Opinion and Order Overruling Demurrer, entered July 17th, 1916.
4. Answer.
5. Replication, dated November 23d, 1916.
6. Opinion and Judgment entered 28th day of December, 1916.
7. Petition for Writ of Error.
8. Bill of Exceptions.
9. Order Allowing and Settling Bill of Exceptions.
10. Assignment of Errors.
11. Order Allowing Writ of Error.
12. Writ of Error.
13. Citation and Service of same.
14. Stipulation of Counsel Providing for Payment of Money into Court in Lieu of Supersedeas Bond.
15. Copy of this Praecipe.

And file said transcript with the Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

JERNIGAN and FESSENDEN,
Attorneys for Defendant. [54]

Return to Writ of Error.

United States of America,
Extraterritorial Jurisdiction in China,
at Shanghai, China,—ss.

In pursuance of the command of the writ of error within, I, Earl B. Rose, Clerk of the United States Court for China, herewith transmit a true copy of the

record, bill of exceptions, assignment of errors and all proceedings in this case of Leonard Everett, plaintiff, versus Swayne and Hoyt, Incorporated, Defendant, lately pending in the United States Court for China, under my hand and the seal of said Court.

Witness my official signature and the Seal of said United States Court for China at the City of Shanghai, within the jurisdiction of said Court this seventh day of July, 1917.

[Seal] EARL B. ROSE,
Clerk of the United States Court for China. [56]

[Endorsed]: No. 3032. United States Circuit Court of Appeals for the Ninth Circuit. Swayne & Hoyt, Incorporated, Plaintiff in Error, vs. Leonard Everett, Defendant in Error. Transcript of Record. Upon Writ of Error to the United States Court for China.

Filed August 14, 1917.

F. D. MONCKTON,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

By Paul P. O'Brien,
Deputy Clerk.